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In the Supreme Court of the United States

OCTOBER TERM, 1945.

No. 507

CENTRAL NATIONAL BANK OF CLEVELAND,
Trustee u/a with EDWIN G. THOMPSON, deceased,
Petitioner,

vs.

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER.

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Apparently it is the burden of the petitioner to strive for clarity, while the respondent strives for confusion. To answer the respondent's contentions one by one is, of course, too great an imposition upon the patience of this Court. This reply brief will attempt merely to point out the principal erroneous assumptions upon which respondent's fantasy of fine distinctions is based.

This case has had three trials and two appeals.

The first trial ended in a disagreement of the jury. It, therefore, will be disregarded, hereafter.

At the second trial a certain quantum of testimony was presented. At the close of *all* of the evidence the trial judge directed a verdict for the respondent (R. p. 9). The present petitioner then appealed (R. p. 11).

The Circuit Court of Appeals for the Sixth Circuit reversed the judgment below, holding that to direct a verdict was erroneous (R. p. 11). The Court then stated that there were upon the state of the record certain questions of fact which *required* submission to the jury (R. p. 14).

Back went the case for a third trial. A verdict was returned for the petitioner, the plaintiff below.

At this point the respondent presented two motions—one for judgment *non obstante veredicto*, and one for a new trial. (Obviously these are two distinct motions and the alternative form in which they were presented is unimportant.)

Both motions were overruled because the District Court felt that to grant *either* was a violation of the previous order of the appellate court (R. 287). The respondent then appealed (R. 289). After argument the Circuit Court of Appeals again referred the case to the District Court (R. 315).

Against this background the respondent has built its argument upon the following fallacies:

I. The erroneous assumption that a motion for judgment n.o.v. and a motion for new trial are governed by the same rules and reasoning.

II. The erroneous assumption that the testimony in the last trial differed materially from the testimony offered in the second trial.

III. The erroneous assumption that the fact that the Circuit Court of Appeals has authority to grant final judgment for the respondent condones a gross abuse of that power.

We shall deal quite briefly with each of these three main errors, attempting to show without undue length how they each create a honeycomb of false conclusions.

I.

RESPONDENT ERRONEOUSLY ASSUMES THAT A MOTION FOR JUDGMENT N.O.V. AND A MOTION FOR NEW TRIAL ARE GOVERNED BY THE SAME RULES AND REASONING.

The petition in this case involves an essential distinction between the nature of a motion for judgment notwith-

standing the verdict and the nature of a motion for a new trial. To ignore this distinction, as respondent's counsel have done, is to throw overboard at the outset any hope of a logical approach to this case.

The distinction between these two motions must be examined with reference to the prior judgment of the Circuit Court of Appeals in this case. That Court had ruled that to direct a verdict at the close of *all* the evidence was error. In other words, the evidence presented a jury question.

Where a directed verdict (at the end of all the evidence) has been forbidden because the evidence presents a jury question, then, *ipso facto,* a motion for judgment *non obstante veredicto* is also improper because it too must be based upon the proposition that the evidence presented no question which required submission to the jury.

Thus the previous decision of the Circuit Court of Appeals that the case required submission to the jury, also foreclosed the granting of judgment notwithstanding the verdict.

Quite the contrary is true of a motion for new trial. Granting a new trial presumes that there *is* a jury question—but that for some error in the previous trial the jury was unable to make a proper decision. To grant a new trial is in no way inconsistent with a prohibition against a directed verdict.

The Circuit Court of Appeals in its opinion (R. p. 316 at p. 318) clearly recognized this distinction between judgment n.o.v. and a new trial. The distinction is again apparent in its opinion upon referral to the District Court for further action upon the motion for new trial (R. p. 315). Thus in our case the trial court, hearing substantially the same evidence upon the third trial, was bound to deny the motion for judgment n.o.v. However, as the opinion of the Circuit Court of Appeals makes clear, the trial court nevertheless had a duty to exercise an independent deci-

sion upon the defendant's motion for a new trial. This is in no way inconsistent with the requirement that the case be submitted to a jury.

In our original brief, we spoke of the limited mandate of the Circuit Court of Appeals, when it sent the case back for a specific ruling by the lower court upon the respondent's motion for new trial. Unfortunately, there is preserved in the Circuit Court of Appeals for the Sixth Circuit no record of the form of its actual mandate (See certification of Clerk, R. p. 321). For this reason the mandate could not appear in the printed record of the proceedings in the Circuit Court of Appeals. Any court, however, speaks only through its journal. The action of the appellate court is clear from its journal entry of judgment (R. p. 315). The mandate, a mere ministerial act of the Clerk in response to this order, of course must be presumed to have followed the order specifically.

The Journal Entry says:

"* * * the case be and the same is hereby remanded to the District Court for further proceedings *in accordance with the opinion of this Court.*" (R. p. 315) (Emphasis supplied.)

The Opinion says:

"For this purpose the case must be remanded, with directions to the court below to consider and act in its own discretion upon appellant's *motion for new trial* * * *" (R. p. 319) (Emphasis supplied.)

Nothing at all is said about another ruling upon the motion for judgment n.o.v.

Why? The answer is clear. Judgment n.o.v. was foreclosed by the ruling upon the first appeal that there were questions of fact that "required submission to the jury." Obviously the Court cannot fulfill this requirement and then nullify it by overruling the verdict.

However, a new trial might be granted for errors in the course of the trial. In other words, a court could order

a *resubmission* of the questions of fact to a new jury. This would be entirely consistent with the ruling of the Circuit Court of Appeals.

There is a clinching argument that the remand was limited to a ruling upon a new trial only. If the record presented no jury question and judgment for the respondent as a matter of law was required, then the Circuit Court of Appeals, with the entire record before it, could have entered that judgment itself. There would have been no reason for sending the case back for any ruling.

II.

RESPONDENT ERRONEOUSLY ASSUMES THAT THE TESTIMONY IN THE LAST TRIAL DIFFERED MATERIALLY FROM THE TESTIMONY OFFERED IN THE SECOND TRIAL.

At the close of the third trial, the trial court said:

"It was the contention of the defendant in support of its motion that the evidence at the last trial was so different from that at the last former trial and so much more in favor of the defendant that this Court would be justified in entering judgment for the defendant notwithstanding the verdict or in ordering a new trial, in spite of the ruling of the court of appeals.

"This Court is of opinion that the additional evidence does not warrant such action. The case was presented mainly upon the transcript of testimony at the last former trial. The variations that were introduced are not sufficient to remove the case from the effect of the order of the court of appeals." (R. p. 286.)

And in the same opinion:

"Since the case was retried on substantially the same evidence as that produced at the last former trial, it seems to this Court that to enter a judgmen for defendant in spite of the verdict for the plaintiff, or to order a new trial for the reasons assigned, would not be consistent with the opinion of the court of appeals. For that reason the motion is overruled." (R. p. 287.)

Yet respondent's counsel seek to lead this Court to believe that the evidence was materially different in the two trials. For example (Respondent's brief, p. 34) an attempt is made to show that Corbett said on the second trial that he knew Thompson was unarmed when he shot him; and on the third trial that he learned he was unarmed only afterwards. What counsel fail to point out is that Corbett admitted upon cross-examination in the last trial the substance of his previous testimony (R. 188-189). The jury, of course, was free to believe his former testimony and to disbelieve any other.

This example is detailed to show how inaccurate a picture respondent's brief presents. The statement of the trial judge that substantially the same evidence was presented at both trials, seems more credible to us.

We also resent the attempt of respondent's counsel to characterize its own recital of the facts as "undisputed or established" (Respondent's brief, p. 2). What in truth they should have said is "there is some testimony to this effect." But their story of aggression and violation of law by Thompson—a story principally out of the mouth of the killer himself—*is* disputed and contradicted. The respondent is merely retelling its version. But the question is not—could a jury have found for the defendant? The question is rather—was there evidence from which the jury was justified and supported in its finding for the plaintiff? And the evidence must be construed for this purpose in the plaintiff's favor—not the defendant's. As we have shown in our original brief, there was plenty of evidence to support our case. The fact that there is also evidence to the contrary is immaterial.

The Circuit Court of Appeals in its order and opinion upon the first appeal said certain questions "required submission to the jury." In the Court's second opinion this was reiterated. If the facts upon the two trials were the same—how then could the trial court fail to submit them?

Counsel for respondent claim that the issues upon the first appeal were not the same as those raised by respondent at the end of the third trial in its motion for judgment n.o.v. They say that different and new reasons were assigned for the latter action. Counsel characterize these reasons advanced by them as "new issues." This is erroneous and misleading.

There was but a single issue in the first appeal. That was—Was it error to direct a verdict for the defendant? The Court decided that the *record as a whole* presented a jury question. The same *issue* was involved in the motion of respondent for judgment n.o.v. at the end of the third trial. The reasons respondent chose to advance or withhold in either instance surely cannot change the fact that the record, substantially the same in the last two trials, required a decision of disputed questions of fact by a jury.

A word here about the New Mexican statutes. It seems clear from the record that there was the *same* evidence of New Mexican law in both trials. (Compare Opinion, p. 14 with Record, pp. 72-74.) Thus the "violation of New Mexican law" issue was there in both cases—inextricably involved in the propriety of either a directed verdict at the end of all the evidence or of judgment n.o.v. Merely that it was not emphasized as a reason or argued in the same fashion surely does not change the issues.

Both opinions of the Circuit Court of Appeals admit that there were questions for the jury. There is not a word to the contrary. Yet the petitioner has been defeated without a jury trial.

III.

RESPONDENT ERRONEOUSLY PRESUMES THAT THE FACT THAT THE CIRCUIT COURT OF APPEALS HAS AUTHORITY TO GRANT FINAL JUDGMENT FOR THE RESPONDENT CONDONES A GROSS ABUSE OF THAT POWER.

It is not enough, in answer to our position, to say that the Circuit Court of Appeals has the *power* to reverse itself and say "no jury question." The court actually, on the record, did no such thing. Its final order said (R. p. 320):

> "* * * it appearing that the judgment of the District Court * * * is equivalent in substance to the granting of a new trial * * * the judgment for the plaintiff be and the same is hereby reversed and the case is remanded with directions to the District Court to dismiss the action."

This still sounds as if the petitioner was entitled to a new trial. But where is it? Surely this is no rescission of the Circuit Court of Appeals' former published opinions and decisions in this very case. (105 Fed. (2d) 878; 136 Fed. (2d) 821.) It looks more as if the Circuit Court of Appeals just became tired of the petitioner and decided to kill off its lawsuit. This ruling, ungraced by any opinion, has the same arbitrary flavor as the trial court's attempt to grant judgment n.o.v. on *all twelve* of the asserted grounds. (R. 307.)

What we complain of is the abuse of power, not its existence. The Circuit Court of Appeals in two published opinions says the petitioner was entitled to a jury trial. The evidence has not been varied, yet by arbitrary ruling the petitioner has been denied its right.

CONCLUSION.

The respondent has based its entire argument upon the three false premises which we have just discussed. With these errors corrected the brief of respondent is wholly meaningless.

The point at issue in this appeal, as we have said, is a simple one—Can the lower courts of the Federal judicial system be permitted, through the medium of highly unorthodox procedure, to deny a clear right to a jury trial?

Respectfully submitted,

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